

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

<b>IN RE BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION MDL 2406</b>	: : <b>Master File 2:13-cv-20000-RDP</b> : : : : <b>This document relates to</b> : <b>Subscriber Track cases</b>
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**DEFENDANTS' RESPONSE TO PROVIDER PLAINTIFFS'  
PROPOSED LANGUAGE FOR INCLUSION IN THE SUBSCRIBER SETTLEMENT  
PRELIMINARY AND FINAL APPROVAL ORDERS**

Defendants submit a brief reply on two key points. *First*, Providers mischaracterize Defendants' position as clearly stated at the Preliminary Approval Hearing record. Providers cherrypick one statement from defense counsel, but omit the further clarifying and explanatory statements on the same issue just a few pages later in the transcript:

MR. ZOTT: Your Honor, it's -- let me -- it's David Zott. Let me jump in just for a second. And I don't want to create any issues that we don't need to have today. *But when I answered, just to be clear, your earlier question about whether this settlement would impact the provider claims as providers, I'm thinking about it really in terms of we're not purporting to release any of their claims, and they've got every ability to assert those claims and to bring them. And that's really the context in which I was addressing it.*

(11/16/2020 Hr'g Tr. 63–64.) Defense counsel went on to explain some of the ways in which the Subscriber Settlement and resulting Blue System changes might impact Providers' claims. (*Compare id.* at 64–65 (“And I do think that [the System changes] would have an impact on the injunctive relief, for example, that providers would seek going forward...I think that is an issue we can address down the line, but we wanted to be clear that we do think, in that respect, there would be an impact”) *with* ECF 2629 at 2.) The Court recognized that all parties are preserving their ability to argue regarding those issues: “I don’t think you're waiving any of those arguments.” (*Id.* at 65; *see also id.* at 58–59 (the Court: “As relates to injunctive relief, obviously there is

always a possibility of some effect [on Providers' claims] because of changes in a way they would affect the Blues system and the way it functions post-settlement or markets. ... But everybody will understand what the new system is and have an opportunity to address that.”.)

**Second,** Providers are wrong to rely on *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986), and *Martin v. Wilks*, 490 U.S. 755 (1989) (Providers' Br. at 2.) Unlike those cases, the proposed Settlement does not “dispose of” Providers' claims or impose additional “obligations” on Providers. To the contrary, the proposed Settlement *expressly preserves* Providers' claims brought in their capacity as providers of health care products or services. (ECF 2610-2 at ¶ 1(uuu).) Moreover, like the consent decree that was upheld in the *Cleveland Firefighters* case, the provision about which Providers now complain “does not bind [Providers] to do or not do anything.” 478 U.S. at 530. The Settlement provides for changes to Defendants' practices, and as a result, will materially change the System. To the extent Providers challenge the go-forward System, those challenges will necessarily be to the System as changed by the Subscriber Settlement and must account for those changes. The proposed System changes do not prejudice providers at all, and do not impose additional “obligations” on them. Elimination of the National Best Efforts rule (which providers challenged as anti-competitive) in the go-forward System eliminates the “combination” that “moved this from a rule of reason into a per se analysis.” (11/16/20 Hr'g Tr. 36–37.) Defendants' proposal preserves the arguments of all parties in the Provider action with respect to the legal impact of the go-forward Blue System. Nothing more (or less) is required at this stage.

Defendants' proposed edits are faithful to the entirety of the Preliminary Approval Hearing record and to the nature of the go-forward System changes. Accordingly, Defendants respectfully request that the Court adopt their proposed edits and reject Providers' proposed edits.

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Respectfully submitted,

/s/ David J. Zott, P.C.

David J. Zott, P.C.

Daniel E. Laytin, P.C.

Sarah J. Donnell

Christa C. Cottrell, P.C.

Zachary Holmstead

KIRKLAND & ELLIS LLP

300 North LaSalle

Chicago, IL 60654

Tel: (312) 862-2000

Fax: (312) 862-2200

david.zott@kirkland.com

daniel.laytin@kirkland.com

sarah.donnell@kirkland.com

christa.cottrell@kirkland.com

zachary.holmstead@kirkland.com

*Counsel for Defendant*

*Blue Cross Blue Shield Association*

Craig A. Hoover

E. Desmond Hogan

Justin Bernick

Peter Bisio

Elizabeth Jose

HOGAN LOVELLS US LLP

Columbia Square

555 13th Street, N.W.

Washington, DC 20004

Tel: (202) 637-5600

Fax: (202) 637-5910

craig.hoover@hoganlovells.com

desmond.hogan@hoganlovells.com

justin.bernick@hoganlovells.com

peter.bisio@hoganlovells.com

elizabeth.jose@hoganlovells.com

*Co-Coordinating Counsel for the Defendants*

David J. Zott, P.C.

Daniel E. Laytin, P.C.

Sarah J. Donnell

Christa C. Cottrell, P.C.

Zachary Holmstead

KIRKLAND & ELLIS LLP

300 North LaSalle

Chicago, IL 60654

Tel: (312) 862-2000

Fax: (312) 862-2200

david.zott@kirkland.com

daniel.laytin@kirkland.com

sarah.donnell@kirkland.com

christa.cottrell@kirkland.com

zachary.holmstead@kirkland.com

*Co-Coordinating Counsel for the Defendants*

John D. Martin  
Lucile H. Cohen  
Travis A. Bustamante  
NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
1320 Main Street, 17th Floor  
Columbia, SC 29201  
Tel: (803) 255-9421  
Fax: (803) 256-7500  
john.martin@nelsonmullins.com  
lucie.cohen@nelsonmullins.com  
travis.bustamante@nelsonmullins.com

Cavender C. Kimble  
BALCH & BINGHAM LLP  
1901 6th Avenue North, Suite 1500  
Birmingham, AL 35203-4642  
Tel: (205) 226-3437  
Fax: (205) 488-5860  
ckimble@balch.com

*With Hogan Lovells, counsel for Anthem, Inc., f/k/a WellPoint, Inc., and all of its named subsidiaries in this consolidated action; Blue Cross and Blue Shield of North Carolina, Inc.; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence Blue Shield of Idaho; Regence Blue Cross Blue Shield of Utah; Regence Blue Shield (of Washington); Regence Blue Cross Blue Shield of Oregon*

Gwendolyn Payton  
KILPATRICK TOWNSEND & STOCKTON  
LLP  
1420 Fifth Avenue, Suite 3700  
Seattle, WA 98101

Kimberly R. West (Liaison Counsel)  
Mark M. Hogewood  
WALLACE, JORDAN, RATLIFF &  
BRANDT, LLC  
First Commercial Bank Building  
800 Shades Creek Parkway, Suite 400  
Birmingham, AL 35209  
Tel: (205) 870-0555  
Fax: (205) 871-7534  
kwest@wallacejordan.com  
mhogewood@wallacejordan.com

*Defendants' Liaison Counsel*

*With Kirkland & Ellis LLP, counsel for Defendant Blue Cross Blue Shield Association*

Christine Varney  
Evan Chesler  
Karin DeMasi  
Lauren Kennedy  
CRAVATH SWAINE & MOORE LLP  
825 8th Avenue  
New York, NY 10019  
Tel: (212) 474-1000  
Fax: (212) 474-3700  
cvarney@cravath.com  
echesler@cravath.com  
kdemasi@cravath.com  
lkennedy@cravath.com

James L. Priester  
Carl S. Burkhalter  
John Thomas A. Malatesta, III  
MAYNARD COOPER & GALE PC  
1901 6th Avenue North, Suite 2400  
Regions Harbert Plaza  
Birmingham, AL 35203  
Tel: (205) 254-1000  
Fax: (205) 254-1999  
jpriester@maynardcooper.com  
cburkhalter@maynardcooper.com  
jmalatesta@maynardcooper.com

Tel: (206) 626-7714  
Fax: (206) 299-0414  
gpayton@kilpatricktownsend.com

J. Bentley Owens, III  
ELLIS, HEAD, OWENS & JUSTICE  
113 North Main Street  
Columbiana, AL 35051-0587  
Tel: (205) 669-6783  
Fax: (205) 669-4932  
bowens@wefhlaw.com

*Counsel for Defendants Premera Blue Cross,  
d/b/a Premera Blue Cross Blue Shield of  
Alaska*

Brian K. Norman  
SHAMOUN & NORMAN, LLP  
1800 Valley View Lane, Suite 200  
Farmers Branch, TX 75234  
Tel: (214) 987-1745  
Fax: (214) 521-9033  
bkn@snlegal.com

H. James Koch  
ARMBRECHT JACKSON LLP  
RSA Tower, 27th Floor  
11 North Water Street  
Mobile, AL 36602  
Tel: (251) 405-1300  
Fax: (251) 432-6843  
hjk@ajlaw.com

*Counsel for Defendants Carefirst, Inc.;  
Carefirst of Maryland, Inc.; Group  
Hospitalization and Medical Services, Inc.;  
CareFirst BlueChoice, Inc.*

R. David Kaufman  
M. Patrick McDowell  
BRUNINI, GRANTHAM, GROWER  
& HEWES, PLLC  
190 East Capitol Street  
The Pinnacle Building, Suite 100

Pamela B. Slate  
HILL HILL CARTER FRANCO COLE &  
BLACK, P.C.  
425 South Perry Street  
Montgomery, AL 36104  
Tel: (334) 834-7600  
Fax: (334) 386-4381  
pslate@hillhillcarter.com

*Counsel for Defendant  
Blue Cross Blue Shield of Alabama*

Helen E. Witt, P.C.  
Jeffrey J. Zeiger, P.C.  
Erica B. Zolner  
Casey R. Fronk  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Tel: (312) 862-2000  
Fax: (312) 862-2200  
hwitt@kirkland.com  
jzeiger@kirkland.com  
ezolner@kirkland.com  
cfronk@kirkland.com

Kimberly R. West (Liaison Counsel)  
Mark M. Hogewood  
WALLACE, JORDAN, RATLIFF &  
BRANDT, LLC  
First Commercial Bank Building  
800 Shades Creek Parkway, Suite 400  
Birmingham, AL 35209  
Tel: (205) 870-0555  
Fax: (205) 871-7534  
kwest@wallacejordan.com  
mhogewood@wallacejordan.com

*Counsel for Defendants Health Care Service  
Corporation, an Illinois Mutual Legal  
Reserve Company, including its divisions  
Blue Cross and Blue Shield of Illinois, Blue  
Cross and Blue Shield of Texas, Blue Cross  
and Blue Shield of New Mexico, Blue Cross*

Jackson, MS 39201  
Tel: (601) 948-3101  
Fax: (601) 960-6902  
dkaufman@brunini.com  
pmcdowell@brunini.com

John D. Martin  
Lucile H. Cohen  
Travis A. Bustamante  
NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
1320 Main Street, 17th Floor  
Columbia, SC 29201  
Tel: (803) 255-9421  
Fax: (803) 256-7500  
john.martin@nelsonmullins.com  
lucie.cohen@nelsonmullins.com  
travis.bustamante@nelsonmullins.com

Cheri D. Green  
BLUE CROSS BLUE SHIELD OF  
MISSISSIPPI  
P.O. Box 1043  
Jackson, MS 39215  
Tel: (601) 932-3704  
cdgreen@bcbsms.com

*Counsel for Defendant Blue Cross Blue Shield  
of Mississippi, a Mutual Insurance Company*

Michael A. Naranjo  
FOLEY & LARDNER LLP  
555 California Street, Suite 1700  
San Francisco, CA 94104  
Tel: (415) 984-9847  
Fax: (415) 434-4507  
mnaranjo@foley.com

Alan D. Rutenberg  
Benjamin R. Dryden  
FOLEY & LARDNER LLP  
3000 K Street, N.W., Suite 600  
Washington, DC 20007  
Tel: (202) 672-5300  
Fax: (202) 672-5399

*and Blue Shield of Oklahoma, and Blue  
Cross and Blue Shield of Montana; Caring  
for Montanans, Inc., f/k/a Blue Cross and  
Blue Shield of Montana, Inc.; Highmark Inc.,  
f/k/a Highmark Health Services; Highmark  
West Virginia Inc.; Highmark Blue Cross  
Blue Shield Delaware Inc.; California  
Physicians' Service d/b/a Blue Shield of  
California*

Jonathan M. Redgrave  
Victoria A. Redgrave  
REDGRAVE, LLP  
14555 Avion Parkway, Suite 275  
Chantilly, VA 20151  
Tel: (703) 592-1155  
Fax: (612) 332-8915  
jredgrave@redgravellp.com  
vredgrave@redgravellp.com

*Additional Counsel for HCSC and  
Highmark Defendants*

BLUE SHIELD OF CALIFORNIA  
50 Beale Street  
San Francisco, CA 94105

*Counsel for California Physicians' Service  
d/b/a Blue Shield of California*

Todd Stenerson  
SHEARMAN & STERLING LLP  
401 9th Street, N.W., Suite 800  
Washington, DC 20004  
Tel: (202) 508-8000  
Fax: (202) 508-8100  
todd.stenerson@shearman.com

Sarah L. Cylkowski  
Thomas J. Rheame, Jr.  
BODMAN PLC  
1901 Saint Antoine Street  
6th Floor at Ford Field

arutenberg@foley.com  
bdryden@foley.com

*Counsel for Defendant USABLE Mutual  
Insurance Company, d/b/a Arkansas Blue  
Cross and Blue Shield*

Robert K. Spotswood  
Michael T. Sansbury  
Joshua K. Payne  
Jess R. Nix  
Morgan B. Franz  
SPOTSWOOD SANSOM & SANSBURY  
LLC  
One Federal Place  
1819 5th Avenue North, Suite 1050  
Birmingham, AL 35203  
Tel: (205) 986-3620  
Fax: (205) 986-3639  
rks@spotswoodllc.com  
msansbury@spotswoodllc.com  
jpayne@spotswoodllc.com  
jnix@spotswoodllc.com  
mfranz@spotswoodllc.com

*Counsel for Defendant Capital BlueCross*

Christine Varney  
Evan Chesler  
Karin DeMasi  
Lauren Kennedy  
CRAVATH SWAINE & MOORE LLP  
825 8th Avenue  
New York, NY 10019  
Tel: (212) 474-1000  
Fax: (212) 474-3700  
cvarney@cravath.com  
echesler@cravath.com  
kdemasi@cravath.com  
lkennedy@cravath.com

John D. Martin  
Lucile H. Cohen  
Travis A. Bustamante

Detroit, MI 48226  
Tel: (313) 259-7777  
Fax: (734) 930-2494  
scylkowski@bodmanlaw.com  
trheaume@bodmanlaw.com

Andy P. Campbell  
A. Todd Campbell  
Yawanna N. McDonald  
CAMPBELL PARTNERS LLC  
505 North 20th Street, Suite 1600  
Birmingham, AL 35203  
Tel: (205) 224-0750  
Fax: (205) 224-8622  
andy@campbellpartnerslaw.com  
todd@campbellpartnerslaw.com  
yawanna@campbellpartnerslaw.com

*Counsel for Defendant Blue Cross and  
Blue Shield of Michigan*

John Briggs  
Rachel Adcox  
AXINN, VELTROP & HARKRIDER, LLP  
950 F Street, N.W.  
Washington, DC 20004  
Tel: (202) 912-4700  
Fax: (202) 912-4701  
jbriggs@axinn.com  
radcox@axinn.com

Stephen A. Rowe  
Aaron G. McLeod  
ADAMS AND REESE LLP  
Regions Harbert Plaza  
1901 6th Avenue North, Suite 3000  
Birmingham, AL 35203  
Tel: (205) 250-5000  
Fax: (205) 250-5034  
steve.rowe@arlaw.com  
aaron.mcleod@arlaw.com

*Counsel for Defendant Independence  
Blue Cross*



NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
1320 Main Street, 17th Floor  
Columbia, SC 29201  
Tel: (803) 255-9421  
Fax: (803) 256-7500  
john.martin@nelsonmullins.com  
lucie.cohen@nelsonmullins.com  
travis.bustamante@nelsonmullins.com

Robert R. Riley, Jr.  
RILEY & JACKSON, P.C.  
3530 Independence Drive  
Birmingham, AL 35209  
Tel: (205) 879-5000  
Fax: (205) 879-5901  
rob@rileyjacksonlaw.com

*Counsel for Defendant Blue Cross and Blue  
Shield of Tennessee, Inc.; Blue Cross and Blue  
Shield of Florida, Inc.; Blue Cross and Blue  
Shield of Massachusetts, Inc.*

Edward S. Bloomberg  
John G. Schmidt  
Anna Mercado Clark  
PHILLIPS LYTLE LLP  
One Canalside  
125 Main Street  
Buffalo, NY 14203  
Tel: (716) 847-8400  
Fax: (716) 852-6100  
ebloomberg@phillipslytle.com  
jschmidt@phillipslytle.com  
aclark@phillipslytle.com

Stephen A. Walsh  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL  
100 Corporate Parkway  
One Lake Level  
Birmingham, AL 35242  
Tel: (205) 572-4107  
Fax: (205) 572-4199  
swalsh@wwhgd.com

Kathleen Taylor Sooy  
Tracy A. Roman  
April N. Ross  
Michael W. Lieberman  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Tel: (202) 624-2500  
Fax: (202) 628-5116  
ksooy@crowell.com  
troman@crowell.com  
aross@crowell.com  
mlieberman@crowell.com

John M. Johnson  
Brian P. Kappel  
LIGHTFOOT FRANKLIN & WHITE LLC  
The Clark Building  
400 20th Street North  
Birmingham, AL 35203  
Tel: (205) 581-0700  
Fax: (205) 581-0799  
jjohnson@lightfootlaw.com  
bkappel@lightfootlaw.com

*Counsel for Defendants Blue Cross of Idaho  
Health Service, Inc.; Blue Cross and Blue  
Shield of Kansas, Inc.; Blue Cross and Blue  
Shield of Kansas City; Blue Cross and Blue  
Shield of Nebraska; Blue Cross Blue Shield  
of Arizona; Blue Cross Blue Shield of North  
Dakota; Blue Cross Blue Shield of Wyoming;  
HealthNow New York Inc.; BlueShield of  
Northeastern New York; BlueCross  
BlueShield of Western New York*

David J. Zott, P.C.  
Daniel E. Laytin, P.C.  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Tel: (312) 862-2000  
Fax: (312) 862-2200  
david.zott@kirkland.com



*Counsel for Defendant, Excellus Health Plan, Inc., d/b/a Excellus BlueCross BlueShield, incorrectly sued as Excellus BlueCross BlueShield of New York*

daniel.laytin@kirkland.com

John Martin  
Lucile H. Cohen  
Travis A. Bustamante  
NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
1320 Main Street, 17th Floor  
Columbia, SC 29201  
Tel: (803) 255-9421  
Fax: (803) 256-7500  
john.martin@nelsonmullins.com  
lucie.cohen@nelsonmullins.com  
travis.bustamante@nelsonmullins.com

*Counsel for Defendants Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Triple-S Salud, Inc.*

Kimberly R. West (Liaison Counsel)  
Mark M. Hogewood  
WALLACE, JORDAN, RATLIFF &  
BRANDT, LLC  
First Commercial Bank Building  
800 Shades Creek Parkway, Suite 400  
Birmingham, AL 35209  
Tel: (205) 870-0555  
Fax: (205) 871-7534  
kwest@wallacejordan.com  
mhogewood@wallacejordan.com

*Counsel for Defendants Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii)*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 24, 2020, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ David J. Zott, P.C.

David J. Zott, P.C.